STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER KENT STRAZISAR and CARMEN RENEE STRAZISAR, Individually and as Next Friends of CHRISTIAN JESSE STRAZISAR, a minor,

Plaintiffs-Appellants,

v

IMMEDIATE CARE CENTER, P.C., EDISON PLAZA, GARY BLISS, M.D., BLODGETT MEMORIAL MEDICAL CENTER, MICHAEL E. NOVAK, M.D., UROLOGY SURGEONS, P.C., P. KOPTIK, M.D., and DANIEL P. McGEE, M.D.,

Defendants-Appellees.

UNPUBLISHED
October 8, 1999

No. 206706
Kent County Circuit Court
LC No. 96-003735-NH

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

In this medical malpractice case, plaintiffs Christopher Kent Strazisar and Carmen Renee Strazisar, parents and next friends of Christian Jesse Strazisar, a minor, alleged that all named defendants were either negligent in the treatment of Christian, or responsible for the negligent acts of their agents and employees. Defendants moved for summary disposition pursuant to MCR 2.116(C)(2) and (8), claiming insufficient process issued and failure to state a claim on which relief can be granted. The trial court granted defendants' motions. We affirm.

On March 26, 1996, plaintiffs mailed a notice of intent to file a claim to defendants, and on March 27, 1996, plaintiffs filed a complaint alleging medical malpractice. On June 5, defendants ICC and Bliss moved for summary disposition pursuant to MCR 2.116(C)(8), claiming that plaintiffs failed to state a cause of action because they did not file an affidavit of merit as required by MCL 600.2912d; MSA 27A.2912(4). On June 26, defendants Novak and Urology Surgeons moved for summary disposition pursuant to MCR 2.116(C)(2) and (8), asserting the same argument as defendants ICC and

Bliss, and in addition claiming that plaintiffs failed to state a claim for medical malpractice because MCL 600.2912b; MSA 27A.2912(2) mandates that a notice of intent to file claim be sent to all potential defendants 182 days before filing a medical malpractice lawsuit, but that plaintiffs filed their complaint only one day after filing a notice of intent to file claim. It is undisputed that plaintiffs did not comply with the provisions of MCL 600.2912b; MSA 27A.2912(2), which requires a 182-day notice before the filing of a medical malpractice lawsuit, and with the provisions of MCL 600.2912d; MSA 27A.2912(4), which requires that an affidavit of merit be filed with the complaint.

This Court has recently ruled on the 182-day notice issue and we must follow the rule of law previously established by a published decision of this Court. MCR 7.215(H); *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 714; 575 NW2d 68 (1997). In *Neal*, *supra*, at 705-06, the plaintiff did not comply with MCL 600.2912b(1); MSA 27A.2912(2)(1), "before commencing suit on March 26, 1996, because he wanted to avoid 'significant compromise and impairment of his vested rights' due to changes in the law wrought by the enactment of certain tort reform legislation that became effective upon and applied to causes of action filed on or after March 28, 1996." This same argument is essentially plaintiffs' argument in the case at hand. However, under MCL 600.2912b(1); MSA 27A.2912(2)(1), a potential plaintiff in a medical malpractice action is required to give 182 days' notice to a potential defendant before commencing suit. The *Neal* Court explained the purpose of this provision:

> The purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs. Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993.

The *Neal* Court considered whether dismissal without prejudice was the appropriate sanction for plaintiff's noncompliance with §2912b(1) and addressed in its decision rulings on similar issues in other state jurisdictions and in Michigan before concluding, in light of its ruling in *Morrison v Dickinson*, 217 Mich App 308; 551 NW2d 449 (1996), "that we are required to hold that dismissal without prejudice was the appropriate remedy for plaintiff's noncompliance with §2912b(1) in this case." *Neal*, *supra*, at 714-15. Further, the Court explained that even if it were not bound by *Morrison*, it would nevertheless conclude that the appropriate sanction for the plaintiff's noncompliance with § 2912b(1) was dismissal without prejudice.

> We reject plaintiff's contention that a stay of proceedings "is more effective than dismissal since the [d]efendants will not be prejudiced since they will get the time they require and the plaintiff will not have a valid claim defeated by an overly harsh remedy." First, the purpose of the notice requirement contained in § 2912b(1) is not to prevent prejudice to a potential defendant, but rather is to encourage settlement without the need for formal litigation. Cf. *Brown v Manistee Co Rd Comm*, 452 Mich 354, 366; 550 NW2d 215 (1996). Second, were we to hold that a plaintiff's noncompliance with

> § 2912b(1) requires dismissal only if the noncompliance prejudices the defendant, we would be supplying a judicial gloss contrary to the clear statutory language mandating that "a person shall not commence an action alleging medical malpractice . . . unless the person has given . . . written notice . . . not less than 182 days before the action is commenced." Cf. *Brown v JoJo-Ab, Inc*, 191 Mich App 208, 212; 477 NW2d 121 (1991). Third, plaintiff has not specified how the 1995 legislation will affect his cause of action and we have been directed to no provision in that legislation that, like *Morrison*, would bar plaintiff from refiling his complaint after the 182-day notice period has passed. In any event, if, as contended by plaintiff, the 1995 legislation does impair "vested rights," plaintiff can certainly challenge this law when it is applied to his cause of action. *Morrison, supra*. Finally, allowing plaintiff to disregard § 2912b(1) and prematurely commence his action simply in order to avoid the 1995 legislation and obtain the alleged benefit of supposedly more favorable law to the formal litigation of his case would directly undercut the statutory purpose of encouraging settlement before formal litigation is commenced. Although there may be cases yet undecided that may warrant a sanction other than dismissal when a plaintiff fails to comply with § 2912b(1), we conclude that the case before us is not such a case. We hold, albeit on slightly different grounds than the trial court below, that the court did not err in dismissing plaintiff's complaint without prejudice as a result of plaintiff's noncompliance with § 2912b(1). [*Id*. at 715.]

See also *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 47-8 ; 594 NW2d 455 (1999).

Within this issue, plaintiffs also argue that § 2912b is unconstitutional because it bars litigants access to the court and deprives them of the capacity to sue for a period of time in violation of Const 1963, art 4 § 27. Plaintiffs claim that the purpose of this section is to provide time and opportunity for people to learn and to prepare for changes that will occur in the law before it becomes operative, *Price v Hopkin*, 13 Mich 318, 325 (1865), and that this policy would be frustrated if the Legislature could defeat this constitutional limitation on the effective date of the statute. Art 4, § 7 provides that "No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house." In response, defendants ICC, Bliss, Novak and Urology Surgeons cite an unpublished decision of this court, *Miller v Mercy Health Services* (#197237 dated 12/12/97), which was decided on the same day as, and by the same panel of this Court as in, *Neal*. Because the plaintiff's arguments in *Miller* were almost identical to those of the plaintiff's arguments in *Neal*, this Court referred the plaintiff to the *Neal* opinion as controlling and it further rejected the plaintiff's additional argument that § 2912b conflicts with Const 1963, art 4, § 27.[1] This Court explained:

> We reject plaintiff's further contention that § 2912b conflicts with Const 1963, art 4, § 27. Section § 2912b requires a plaintiff to give notice before filing a medical malpractice action. The constitutional provision determines the date upon which a newly enacted law takes effect. There is simply no conflict. As for plaintiff's claim that

> one of the purposes underlying the constitutional provision would be frustrated here, in light of the fact that she could not possibly have given notice and filed suit between the time the 1995 legislation was signed into law and took effect, we submit that a sufficient answer is given by defendant Mercy's observation that a number of policies are embodied in Const 1963, art 4, § 27. Moreover, the constitution itself recognizes that citizens have no absolute right to at least 90 days notice before a law takes effect where Const 1963, art 4, § 27 also provides that laws may be given immediate effect if both houses of the Legislature agree in sufficient numbers. [*Miller, supra*, slip op at 2.]

Although unpublished opinions are not binding precedent, MCR 7.215(C)(1); *Watson v Michigan Bureau of State Lottery*, 224 Mich App 639, 648; 569 NW2d 878 (1997), we believe that *Miller* is highly persuasive and that it clearly responds to the same argument as raised by plaintiffs herein.

In *Neal, supra*, at 716-17, this Court also addressed the plaintiff's argument that "§ 2912b(1) violates the constitutional guarantee of equal protection of the law because it treats medical malpractice plaintiffs differently than other tort plaintiffs" and that the strict scrutiny test is appropriate because § 2912b affects a plaintiff's fundamental right of access to the courts. Within its discussion of this argument, this Court stated that "§ 2912b(1) does not bar medical malpractice plaintiffs from access to the court system, but merely provides a brief temporal restriction before suit may be commenced," and this Court rejected the application of the strict scrutiny test and the substantial relationship test. *Id.*, at 718. Instead, reviewing § 2912b(1) under the rational basis test, this Court explained:

> Under the rational basis test, legislation is presumed to be constitutional and the party challenging the statute has the burden of proving that the legislation is arbitrary and thus irrational. A statute does not violate equal protection under the rational basis test if it furthers a legitimate governmental interest and the challenged classification is rationally related to achieving that interest. A rational basis exists when the legislation is supported by any state of facts either known or that could reasonably be assumed.
>
> Section 2912b(1) is part of 1993 PA 78. This public act was enacted for the general purpose of addressing the problems of, and widespread dissatisfaction with, Michigan's medical liability system, specifically, the availability and affordability of medical care in the face of spiraling costs. Senate Bill Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993. As indicated previously, § 2912b(1) was enacted for the purpose of promoting settlement without the need for formal litigation and reducing the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs. "The state unquestionably has a legitimate interest in securing adequate and affordable health care for its residents." *Bissell v Kommareddi*, 202 Mich App 578, 580-581; 509 NW2d 542 (1993). The means sought by the Legislature, i.e., a relatively short notice period before the commencement of suit during which time informal discovery can occur, is rationally related to the Legislature's objective because it is reasonable to assume that claims informally resolved or settled without resort to formal litigation will help reduce

> the cost of formal medical malpractice litigation. . . . We conclude that plaintiff has failed to show that the classification of medical malpractice plaintiffs does not bear a rational relationship to the object of the legislation. [*Id*. at 719-20; citations omitted.]

For these same reasons, the *Neal* Court found that § 2912b(1) did not violate due process, holding that it bears a reasonable relation to a permissible legislative objective, which is the pertinent issue in a due process claim. *Id.*, at 720-21. This Court further noted that "§ 2912b does not abrogate or vitiate any vested property rights plaintiff has in his cause of action or effectively divest plaintiff of access to the courts. Rather, § 2912b simply provides a brief temporal restriction before suit may be commenced." *Id.*, at 721. Thus, this Court has already determined that § 2912b does not violate equal protection and due process guarantees.

With regard to plaintiffs' argument regarding delegation of legislative power or judicial authority to private citizens, this Court again addressed this same issue in *Neal, supra*, at 721, explaining as follows:

> [P]laintiff contends that § 2912b is an unconstitutional delegation of legislative authority to a private party, i.e., the potential defendants, because it allows them to determine when a potential plaintiff will have his day in court, i.e., after the expiration of 182 days or any of the lesser time periods specified in § 2912b. It is true that the Legislature may not delegate its lawmaking powers to private individuals or entities. However, the Legislature has not done so in this case. Rather, the Legislature has simply provided for a presuit notice period before the commencement of a medical malpractice action. Although the time at which the complaint may be filed will depend upon the potential defendant's actions or inactions, this does not constitute a delegation of legislative power. [Citations and footnotes omitted.]

Because the *Neal* Court has already addressed the same issues regarding separation of powers as raised by plaintiffs on appeal, plaintiffs' argument is again without merit.

In light of our conclusion that *Neal* clearly resolves the issues raised by plaintiffs in this case, and compels that we affirm the trial court's grant of summary disposition, there is no need for us to address issues raised by plaintiffs concerning the affidavit of merit requirement set forth under MCL 600.2912d; MSA 27A.2912(4).

Affirmed.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman
/s/ Patrick M. Meter

[1] The *Neal* Court assumed for purposes of analysis, without deciding, that § 2912b(1) is a rule of procedure. Cf. *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).